No. 89-181

In The

Supreme Court of the United States

October Term, 1989

EUGENIA RODRIGUEZ, Individually and as Next Friend of Alberto Torres,

Petitioner,

v.

ROBERTO AVITIA, et al, CITY OF BROWNSVILLE, TEXAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES E. BELTON*
GOMEZ & BELTON
700 Paredes Line Rd.,
Suite 105
Brownsville, Texas 78521
(512) 544-1082
Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Respondent, the City of Brownsville, Texas, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Eugenia Rodriguez, Individually and as Next Friend of Alberto Torres, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on May 1, 1989.

STATEMENT OF THE CASE

This case is an action under 42 U.S.C. §1983 seeking to impose liability on the Respondent, a municipality, based on a custom of grossly inadequate police training. This action arises out of a single shooting incident that occurred on August 29, 1980 in which Petitioner's son, Alberto Torres, was wounded by a single shot fired by Brownsville Police Officer, Robert Avitia.

At a hearing held in the trial court at which leave was granted to Petitioner to file her Second Amended Complaint pleading grossly inadequate training as her new theory of recovery against Respondent city, the Petitioner conceded that the claim was "basically one officer and one situation, one incident," and that as to other incidents Petitioner had nothing to add. (Pet. A, 6a-7a and 13a-14a). The Petitioner had earlier dismissed Officer Avitia from this action as "uninsured and unnecessary." (Pet. A, 6a, N.2, and 14a)

The trial Court, in granting Respondent's Motion to Dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, first concluded that Petitioner's allegation in the Second Amended Complaint failed to sufficiently plead an officially adopted or promulgated municipal policy. (Pet. A, 14a-15a). Regarding the theory of showing a custom of inadequate training, through persistent and widespread practices of police misconduct, the Court concluded that Petitioner pled no such facts and that Petitioner had conceded that she had no evidence of similar incidents of police misconduct resulting from inadequate training in order to plead the same. (Pet. A, 15a-16a). On appeal, the Fifth Circuit Court of Appeals

considered the sole issue of whether Petitioner had adequately pled a custom or practice of grossly inadequate police training. The Court of Appeals held that the trial court properly dismissed the complaint and affirmed the trial court's order. (Pet. A, la-8a). In arriving at its opinion, the Court of Appeals applied *Monell v. Department of Social Services*, 463 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *City of Oklahoma v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.E.2d 791 (1985); and *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983) *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984). The lower court also cites and discusses *City of Springfield v. Kibbe*, 480 U.S. 257, 107 S.Ct. 1114, 94 L.E.2d 293 (1987) and *City of Canton, Ohio v. Harris*, ___ U.S. ___, 109 S.Ct. 1197, 103 L.E.2d 412 (1989) in response to Petitioner's theory for recovery as argued before said Court.

REASONS FOR DENYING THE WRIT

I.

OPPOSITION TO QUESTIONS PRESENTED FOR REVIEW

Petitioner attacks the Court of Appeals judgment first asserting that in deciding her case both the trial court and Court of Appeals misconstrued and misapplied the "single incident" rule established in *City of Oklahoma v. Tuttle, supra*. Second, Petitioner argues that a §1983 cause of action for deliberate indifference for failure to train police officers can now be carved out of Petitioner's Second Amended Complaint, which would allow the application of the rules announced in *City of Canton, Ohio v. Harris,*

supra, and which opinion allows a policy of inadequate police training to be referred from the conduct of several officers during a single incident absent evidence of prior acts or similar incidents of police misconduct. (Pet., [i] – questions presented)

It is important to stress at the outset that the §1983 claim upon which Petitioner has relied in the trial court and the Court of Appeals is a custom of grossly inadequate (grossly negligent) police training in handling and subduing armed and emotionally distraught individuals, such as the Petitioner's son. (Pet. A, 2a-7a).

The law regarding §1983 municipal liability applied and cited by the Court of Appeals begins with *Monell v. Department of Social Services, supra*. *Monell* held that a municipality cannot be held liable under §1983 on a respondent superior theory. Id. 436 U.S. at 691, 98 S.Ct. at 2036.

The Supreme Court further held that:

> " . . . a municipality may be sued for damages under §1983 when the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers' or is 'visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision making channels." Id. at 690-691, 98 S.Ct. at 2035-36.

Quoting from *Addickes v. S.H. Kress & Company*, 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613, 26 L.Ed.2d 142 (1970), the court went on to cite the following with approval.

> "Congress included customs and usages [in §1983] because of the persistent and widespread discriminatory practices of state officials. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." Id. at 691, 98 S.Ct. at 2035-2036.

In *Languirand v. Hayden, supra,* the Fifth Circuit addressed the issue of §1983 municipal liability for failure to train and established the following standard:

> " . . . [I]f there is a cause of action under Section 1983 for failure to properly train a police officer whose negligent or grossly negligent performance of duty has injured a citizen, that such failure to train must constitute gross negligence amounting to conscious indifference, and that a municipality is not liable under Section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force." Id. at 227-228.

In *City of Oklahoma v. Tuttle, supra,* the Court held that a single isolated incident of police misconduct is not sufficient to impose §1983 liability against a municipality under *Monell.*

The Court further expressed that:

> "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell,* unless proof of the incident includes proof that it was caused by an existing,

> unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." Id. 471 U.S. at 823-824, 105 S.Ct. at 2436.

The Court in *City of Springfield v. Kibbe, supra,* held that certiorari had been improvidently granted where the city failed to properly preserve for review the question whether inadequate training is a proper basis for municipal liability. However, in *City of Canton, Ohio v. Harris, supra,* the court concluded that there are limited circumstances in which an allegation of a failure to train can be the basis for liability under §1983 and held that deliberate indifference in failure to police officers is the standard of fault and causation in such cases.

In reviewing the trial court's order, the Court of appeals noted that the law applicable to this case had been well settled for some time. (Pet. A, 5a). Applying the statements of law on municipal §1983 liability established in *Monell, Tuttle, City of Canton* and *Languirand* to Petitioners pleadings and concessions, the Court of Appeals found that Petitioner's pleading fell short of pleading a cause of action against the City, and that such pleading described no more than a single incident of arguably excessive force applied by one officer. Petitioner had "no case – not as a matter of pleading, merely, but as one of conceded fact." (Pet. A, 6a-7a).

The lower Court also considered the dissent in *Kibbe* and the *City of Canton* opinion as argued by Petitioner in support of her §1983 grossly negligent theory. The court recognized that *City of Canton* mooted the question of municipal liability for inadequate training and the applicable standard, and that *Kibbe* did not announce any departure from the single incident rule where the conduct of several officers might be involved or the Fifth Circuit's rule in *Languirand*. (Pet. A., 7a-8a). The Court of Appeals concisely addressed the issue on appeal and did not, as Petitioner contends, misconstrue or misapply the "single incident" rule in affirming the trial court's order of dismissal pursuant to Rule 12(b)(6), F.R.C.P.

Before Petitioner filed her Second Amended Complaint, the Fifth Circuit had explored the contours of, analyzed, re-evaluated, reiterated with approval and expanded upon *Monell, Tuttle* and *Languirand* in a number of other decisions dealing with §1983 claims against municipalities for inadequate police and city employee training. See *Berry v. McLemore*, 670 F.2d 30 (5th Cir. 1982); *Bennett v. Slidell*, 735 F.2d 861 (5th Cir. 1984) per curiam modifying 728 F.2d 762 (1984) (en banc) *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985); *Webster v. City of Houston*, 735 F.2d 838 (5th Cir. 1984)(en banc), rev'd on other grounds, 739 F.2d 993 (5th Cir. 1984)(en banc); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) reh. denied 779 F.2d 1129 (1986) (en banc) *cert. denied*, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987); and, *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987). However, since the general law applicable to this case had been well settled in *Monell, Tuttle* and *Languirand*, the Court of Appeals apparently deemed it

unnecessary to rely on any of the above cases in deciding this case.

The thrust of Petitioner's second argument, which is artfully and tactfully phrased, is that from a selective reading and conclusory interpretation of the Petitioner's allegations in the Second Amended Complaint a characterization of facts within the rules of *City of Canton* can be found from which a policy of inadequate police training sufficient to meet the requirements of *City of Canton* can be inferred absent evidence of prior or similar incidents of police misconduct.

In *City of Canton, supra,* the Court's holding is as follows:

> "We hold today that the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. 109 S.Ct. at 1204, 103 L.Ed.2d at 426.

Monell, and *Tuttle* are cited in *City of Canton* with approval, and the Court succinctly states that:

> "Only when a failure to train reflects a 'deliberate' or 'consciousness' choice by a municipality -- a 'policy' as defined by prior cases – can a City be liable for such a failure under §1983." Id. 103 L.Ed.2d at 427.

Further elaborating, the Court states that it will not suffice to impose §1983 liability against a city "by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible;" "that a particular officer may be unsatisfactorily trained . . . ;" nor "that an injury

or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury causing conduct." Id. 103 L.E.2d at 427-428. Petitioner's assertions for granting writ of certiorari herein are precisely the above what "the city could have done" arguments rejected by the Court. Id. 103 L.E.2d at 428-429.

Petitioner is, in effect, requesting that the Court ignore the teachings of *Monell* and *Tuttle;* ignore the Fifth Circuit's application of these teachings in *Languirand* and in the present case; ignore Petitioner's concession that this is a single incident/single officer situation; and ignore that the claim pled and argued below was a §1983 cause of action based on a custom of grossly inadequate (grossly negligent) police training in subduing and handling an armed and emotionally distraught individual, such as Petitioner's son. This is not justified, and purely and simply serves to demonstrate that Petitioner is the one misconstruing and refusing to recognize the law applicable to her case.

The Court of Appeals' refusal to grant Petitioner permission to proceed against the Respondent based on her Second Amended Complaint was proper, and correctly prevented Petitioner from seeking to impose §1983 liability against the Respondent based on a pleading that "would result in de facto respondent superior liability;" "engage the federal court in an endless exercise of second-guessing municipal employee-training programs"; and, "would implicate serious questions of federalism." See *City of Canton v. Harris, supra,* 103 L.Ed 2d at 428-429.

Petitioner has conceded that she has pled her case fully and has nothing to add to show a custom of grossly negligent police training, which is a lesser standard than the "deliberate indifference" standard of *City of Canton*. Consequently, the Court of Appeals properly affirmed the trial court dismissal of Petitioner's claim for failure to state a cause of action upon which relief may be granted without having to add that "it appeared beyond doubt that Petitioner had no set of facts to support her claim which would entitle her to relief." See *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); *Palmer v. City of San Antonio, supra*, at 515. See also *Elliott v. Perez*, 751 F.2d 1472, 1479 and N.20 (5th Cir. 1985) (Holding that a §1983 plaintiff must state specific facts and not merely conclusory allegations)

The holding of the Court of Appeals is not in conflict with applicable decisions of this court and this case does not present an important federal question which has not been settled by this court. Rule 17, U.S. Sup. Ct. Rules.

II.

FAILURE TO PRESERVE QUESTIONS PRESENTED FOR REVIEW

Petitioner in her Second Amended Complaint and argument to the lower courts advanced only a §1983 theory based on gross negligence (grossly inadequate training).

In *Languirand*, supra at 227-228 the Fifth Circuit had held that "such failure to train must constitute gross negligence amounting to conscious indifference." After *Tuttle*, the Fifth Circuit in *Grandstaff, supra*, 767 F.2d at

170, also expressed its "doubt that a finding of 'gross negligence' in that inadequate training will always be the ticket to municipal liability." In *Kibbe*, the dissenting opinion of Justice O'Connor, joined by Chief Justice Rehnquist, Justice White and Justice Powell, announced that the dissenting justices were prepared to hold that in inadequate police training cases the standard that should be required is "reckless disregard or deliberate indifference," *Kibbe*, Id. 480 U.S. at 268-269, 107 S.Ct. at 1121. The "deliberate indifference" standard was then established in *City of Canton*. The Petitioner cannot truthfully deny having had notice that a "gross negligence" allegation was insufficient. Petitioner clearly and purposely decided to rely on a lesser standard of gross negligence in light of the other serious defects in her amended complaint that she would need to overcome in order to prevent dismissal of her suit. Now, having exhausted and failed on the claim as pled and argued in the lower courts, Petitioner for the first time contends that "deliberate indifference" is the standard by which her pleading should be judged in order to justify her attempt to carve out from her pleadings an inferred policy and cause of action under *City of Canton*. Petitioner thereby hopes to bypass the *Monell, Tuttle* and *Languirand* requirements for showing the existence of a custom as followed by the Court of Appeals in deciding her case. By her own tactics and objectives in the lower courts, the Petitioner failed to preserve the questions presented that she now desires this court to review. See *City of Canton, supra* at 103 L.Ed.2d at 423-424; *Kibbe, supra*, 480 U.S. at 258-260, 94 L.Ed.2d at 297-298 and *Tuttle, supra*, 471 U.S. at 815-816, 85 L.Ed.2d at 798-799 (discussing preservation of issues

and raising objections to questions presented no later than respondent's brief in opposition to petition for certiorari.) As previously argued above, Petitioner has thoroughly failed to even adequately plead a §1983 claim against Respondent under the lesser standard of gross negligence fashioned by her in the lower courts.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES E. BELTON*
GOMEZ & BELTON
700 Paredes Line Rd.,
Suite 105
Brownsville, TX 78521
Tel. (512) 544-1082
Counsel for Respondent

*Counsel of Record